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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DON VALENTINO ZDYBEL,

Plaintiff and Appellant,

v.

JEAN CHENG,

Defendant and Respondent.

E068676

(Super.Ct.No. RIC1502805)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge.

Affirmed.

Don Valentino Zdybel, in pro. per., for Plaintiff and Appellant.

Kramer, deBoer & Keane, Jeffrey G. Keane and Scott E. Saunders for Defendant and Respondent.

Plaintiff and appellant Don Valentino Zdybel appeals the trial court's grant of summary judgment in favor of defendant and respondent Jean Cheng, M.D. (Cheng) on Zdybel's claim of medical malpractice. The trial court concluded that no triable issue of

material fact existed regarding whether Cheng breached the applicable standard of care. We affirm.

I. FACTS

A. *Cataract Surgeries*

In June 2013, Zdybel visited Cheng, who upon examination found that Zdybel had cataracts in both eyes. After Cheng discussed the risks, benefits, and alternatives of cataract extraction with Zdybel, Zdybel authorized a cataract extraction and intraocular lens implant for his right eye. At an appointment thereafter, Zdybel signed an informed consent form, and Cheng performed a cataract extraction on Zdybel's right eye. The procedure was a success; at a follow-up visit the next day, Zdybel had visual acuity of 20/30 in his right eye. At the follow-up visit, Cheng again discussed the risks, benefits, and alternatives of the procedure with Zdybel, and Zdybel authorized a similar procedure for his left eye.

On October 15, 2013, Zdybel signed another informed consent form, and Cheng performed the procedure on Zdybel's left eye. This time, however, the lens implant slipped into the vitreous body of the eye, and Cheng informed Zdybel that a retina surgeon would need to perform a further procedure. Cheng also informed Zdybel to come back the next day. Zdybel did not show up for that appointment but instead went to the emergency room at Riverside Community Hospital due to eye pain.

Following the procedure on Zdybel's left eye, Cheng submitted an urgent request with a retina specialist at the Pacific Eye Institute. The request was approved and an appointment scheduled for November 4, 2013, but Zdybel did not show up. Zdybel

eventually met with Dr. Roger Novack (Novack) at the Pacific Eye Institute on November 18, 2013. Although retina surgery was scheduled for November 25 at the Pacific Eye Institute, Zdybel did not show up. At a December 5, 2013, appointment, Cheng informed Zdybel that he needed retina surgery as soon as possible. Novack ultimately operated on both of Zdybel's eyes on December 16, 2013, and on his left eye again on March 17, 2014.

B. Complaint

Zdybel filed suit on March 9, 2015, against Cheng on a single cause of action for medical malpractice. The complaint alleged that Cheng breached her duty of care by “wrongfully performing surgery that was below the standard of care and by failing to provide adequate post-operative care” Specifically, it alleged that Cheng “failed to properly perform surgery and appropriate after-care . . . failed to properly diagnose [Zdybel's] true condition in a timely manner and to notify him of said condition, [and] failed to make a timely referral to a retinal specialist in order to save [Zdybel's] eyesight”

C. Motion for Summary Judgment

Cheng moved for summary judgment, arguing that the cause of action was barred by the statute of limitations and that Zdybel could not produce admissible evidence to show that Cheng's actions fell below the standard of care.

In support of her motion, Cheng submitted the expert declaration of William J. Christie, M.D. (Christie), who is board certified in ophthalmology. Christie opined that Cheng's treatment complied at all times with the applicable standards of care.

Specifically, Christie opined that Cheng discussed the risk, benefits, and alternatives of cataract extraction with Zdybel; that Zdybel was an appropriate candidate for the procedures; that the reports of the procedures do not indicate any abnormal complications or indicate that Cheng's performance fell below the standard of care; and that Cheng timely referred Zdybel to a retina specialist and complied with the standard of care for the procedures following Cheng's surgeries.

Although Zdybel filed some exhibits support of in his opposition to the motion, he did not file an expert declaration to rebut Christie's declaration.

The trial court granted Cheng's motion "on the grounds that there is no triable issue of material fact that defendant breached the applicable standard of care (reference declaration of William Christie, M.D.)." The trial court denied summary judgment on the statute of limitations issue.

II. DISCUSSION

A. *Applicable Law*

We independently review an order granting summary judgment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant moving for summary judgment bears the burden of showing that one or more elements of the cause of action cannot be established by the plaintiff to the

degree of proof that would be required at trial, or that there is a complete defense to the cause of action. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1331; Code Civ. Proc., § 437c, subd. (o).) To be “material” for summary judgment purposes, a fact must relate to some claim or defense and it must be essential to the judgment in that, if proved, it could change the outcome of the case. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.)

“[I]n any medical malpractice action, the plaintiff must establish: ‘(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.’” (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877.)

“The standard of care against which the acts of a [medical professional] are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony” (*Sinz v. Owens* (1949) 33 Cal.2d 749, 753.) “‘When a defendant [in a medical malpractice case] moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’” (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.)

B. *Analysis*

The trial court properly granted Cheng's motion for summary judgment because Zdybel failed to offer expert evidence to rebut Christie's declaration that carried Cheng's initial burden of establishing there was no violation of the standard of care. "California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801)." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Because Christie established himself as an expert in ophthalmology, stated that he reviewed the medical file, and opined that there was no indication that Cheng's action fell below the standard of care, Cheng met her initial burden.

Zdybel argues that the evidence he submitted as part of his opposition to the motion for summary judgment "speaks for itself" in showing triable issues of material fact. What Zdybel does not address, however, is the fact that the trial court sustained Cheng's objections to all of Zdybel's exhibits. Zdybel has not argued on appeal that the exhibits were improperly excluded. "Even when our review on appeal 'is de novo, it is limited to issues which have been adequately raised and supported in [the appellant's opening] brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned.'" (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836.) The issue of whether the exhibits were properly excluded is therefore waived, and Zdybel may not rely on those exhibits here.

Even if we were to consider the exhibits, Zdybel has presented no ““conflicting expert evidence”” establishing a triable issue of material fact. (*Munro v. Regents of University of California, supra*, 215 Cal.App.3d at p. 985.) The only declaration Zdybel submitted in opposition to the motion for summary judgment was his own, which does not purport to be expert testimony.

Zdybel, citing Illinois case law, states that exceptions to the general rule requiring expert testimony exist where the physician’s treatment is “grossly apparent” or where the treatment is so common that it is within the everyday knowledge of a layperson. We construe this, along with Zdybel’s assertion that an entire cataract cannot be ““missed[] or completely overlooked”” during a cataract surgery, as an argument that a similar exception should apply here. In California, a “narrow exception” to the rule requiring expert testimony “exists where ““the conduct required by the particular circumstances is within the common knowledge of the layman.’ [Citations.]”” [Citation.] This exception is, however, a limited one. It arises when a foreign object, such as a sponge or surgical instrument, is left in a patient following surgery and applies only when the plaintiff can invoke the doctrine of *res ipsa loquitur*. [Citations.]” (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542-1543.) Here, nothing in the record suggests that Cheng “missed” or “entirely overlooked” Zdybel’s cataracts, and the nature of her alleged misconduct is not analogous to leaving a sponge or surgical instrument inside a patient. Unlike those situations, there is no obvious reason why any damage to Zdybel here was not the result of the inherent risk of the procedure, rather than an act of Cheng below the standard of care. The “narrow exception” therefore does not apply. (*Ibid.*)

Because Christie concluded that Cheng’s actions fell within the standard of care and Zdybel offered no conflicting expert testimony, we conclude that summary judgment was proper.

III. DISPOSITION

The judgment is affirmed. Cheng is awarded her costs on appeal.

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RAPHAEL

J.

We concur:

MILLER

Acting P. J.

SLOUGH

J.